

Karokhil (Migration) [2017] AATA 373 (27 February 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Samra Karokhil
VISA APPLICANTS:	Mr Mohammad Samir Arghandiwal Ms Sohila Ghafori
CASE NUMBER:	1606170
DIBP REFERENCE(S):	BCC2016/837248
MEMBER:	Moir Brophy
DATE:	27 February 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 27 February 2017 at 4:26pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 – Genuine and continuing relationship – Credibility issues – Inconsistent evidence – No mutual commitment

LEGISLATION

Migration Act 1958, ss 5F, 65, 359A

Migration Regulations 1994, Schedule 2, cl 309.211, cl 309.221, r 1.15A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 1 May 2016 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 2 February 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.221.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 as the delegate was not satisfied the parties were in a genuine and continuing relationship.
4. The review applicant, Mrs Samra Karokhil appeared before the Tribunal on 5 December 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, Mr Mohammad Samir Arghandiwal.
5. The review applicant was represented in relation to the review by her registered migration agent. The Tribunal was assisted by an interpreter in the Arabic language.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

Background

7. The visa applicant is a 27 year old male who resides in Afghanistan. He has declared no previous relationships. His father is deceased and his mother, Sohila Ghafari is listed as an additional applicant.
8. The review applicant is a 29 year old female living in Sydney. She was previously married to Samay Hassangadeh in the period from 7 September 2005 to 18 January 2015. There were two children of the marriage, a son born in 2009 and a daughter born in 2011. Her parents live in Afghanistan as do her three sisters and one brother.
9. At the time of the application the parties stated they met in Afghanistan on 13 July 2014 when the review applicant was visiting her mother in hospital. The mother of the visa applicant was in the same hospital room. The parties were married on 17 November 2015.
10. The review applicant was interviewed on 16 March 2016 by a Departmental officer.
11. The delegate who made the original decision noted the following issues:

- There was no evidence of joint financial purchases or any shared financial responsibilities.
- The parties had not provided any evidence that they had established a joint household.
- No evidence they were socially recognised as being in a relationship.
- There were no characteristics of the parties being in a genuine spousal relationship.

Tribunal Proceedings

12. The issue in the present case is whether the visa and review applicants were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
13. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the review applicant and the visa applicant at the hearing.
14. There were a number of inconsistencies in the review applicant's oral evidence and these were put to the review applicant after the hearing in accordance with section 359A of the Act. The Tribunal explained the relevance and the consequences of relying on that information in terms of his credibility.
 - The visa applicant said his mother was in hospital for two days and the review applicant's mother was in hospital for somewhere between 15 and 20 days. This was inconsistent with the evidence given by the review applicant that her mother had been in hospital for 15 days and his mother had been in hospital for one week.
 - The visa applicant said he had seen the review applicant twice after they met at the hospital and before the review applicant returned to Australia. This was inconsistent with the evidence the review applicant gave at the time of hearing that she saw the visa applicant six or seven times before she returned to Australia.
 - The visa applicant said the review applicant stayed at his place for 17 days when she went to Afghanistan for the wedding in November 2015. This was inconsistent with the evidence the review applicant gave at the time of hearing that for three nights before the wedding she stayed at her parents' house and then from the night of the wedding she moved to the visa applicant's house where she stayed for 14 days.
 - The visa applicant said during the time spent together after the marriage the review applicant would cook and sometimes they would have takeaway, and that they shared doing the house work together. This was inconsistent with the evidence the review applicant gave at the time of hearing that during the 14 days the parties spent together after their marriage the visa applicant's mother did all the chores in the house and did not allow the review applicant to help.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

15. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage in Afghanistan on 17 November 2015, and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the marriage between the parties is a valid marriage for the purposes of the Act, as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

Financial Aspects of the relationship

18. The review applicant told the Tribunal that she was living in a two bedroom apartment. She lived there with her two children and another couple and their one child. The rent was \$770 per fortnight. She had lived at the property for five years. The review applicant is in receipt of an income from Centrelink. She is paid parenting payment single and family tax benefits and receives between \$1050 and \$1200 per fortnight.
19. The visa applicant is employed and he lives with his mother.
20. The parties do not hold any joint assets or liabilities. They do not share day-to-day household expenses and each maintains their own bank accounts for day to day expenses. This is not unusual given the review applicant is in Australia and the visa applicant is in Afghanistan.
21. The Tribunal places limited weight on this aspect of the relationship.

Nature of the Household

22. It is accepted the parties have spent little time as part of the one household since their marriage in November 2015. The Tribunal accepts that when the review applicant went to Afghanistan in November 2015 she stayed at the home of the visa applicant and his mother after the wedding.

23. The Tribunal accepts the evidence of the review applicant that during the time she spent at the visa applicant's house his mother took care of the running of the household and she tended to her own personal needs.
24. The parties gave consistent evidence about their plans to establish a joint household and to raise the review applicant's daughters together. The Tribunal places limited weight on this aspect of the relationship given the very limited periods of cohabitation since marriage.

Social aspects of the relationship

25. The evidence in relation to this aspect of the relationship was somewhat lacking. The Tribunal did not have the benefit of oral evidence from witnesses who had observed the parties together since their marriage. However, the Tribunal did have the benefit of photographic evidence and statutory declarations provided prior to the hearing attesting to the genuineness of the relationship.
26. Nonetheless, based on the evidence available to it, the Tribunal accepts that the parties represent themselves to other people as being married to each other and that their immediate family members consider them to be in a genuine and continuing spousal relationship.

Nature of the relationship

27. The evidence as to the parties commitment to each other was, when considered in its totality confused and unconvincing. Both at the time of hearing and in the additional statement received from the review applicant she spoke of her commitment to the marriage and of establishing a life together with the visa applicant. The Tribunal was not convinced on the evidence that commitment to the marriage was a mutual commitment.
28. The Tribunal was concerned at the rapid inception of the relationship and the decision to marry particularly in the context of the inconsistencies in the evidence surrounding when they met and how their relationship progressed. There were inconsistencies in the evidence as to how often the parties met after their mothers had been discharged from hospital. Those inconsistencies were put to the review applicant after the hearing in accordance with the requirements of section 359A and the Tribunal has considered the explanations provided. The explanation provided for the inconsistencies was not persuasive. In the context of parties being only together for short periods of time the Tribunal regards information about how often they met to be of importance when assessing the nature of the commitment of the parties to the relationship. The explanation provided for the inconsistencies was not persuasive
29. The visa applicant said the review applicant stayed at his place for 17 days when she went to Afghanistan for the wedding in November 2015. This was inconsistent with the evidence the review applicant gave at the time of hearing that for three nights before the wedding she stayed at her parents house and then from the night of the wedding she moved to the visa applicant's house where she stayed for 14 days. Those inconsistencies in the evidence were put to the review applicant after the hearing in accordance with the requirements of section 359A and the Tribunal has considered the explanations provided. The Tribunal does not accept the confusion was caused by the interpreter not interpreting correctly. Had that been the case it would have been reasonable to expect either the review applicant or the agent to bring it to the attention of the member at the time. The Tribunal does not regard it as plausible the parties would not remember with some specificity such important details. Conflicts in the evidence

about such events are in the Tribunal's view either indicative of the event not taking place or it not taking place in the manner described.

30. The visa applicant said during the time spent together after the marriage the review applicant would cook and sometimes they would have takeaway, and that they shared doing the house work together. This was inconsistent with the evidence the review applicant gave at the time of hearing that during the 14 days the parties spent together after their marriage the visa applicant's mother did all the chores in the house and did not allow the review applicant to help.
31. Those inconsistencies in the evidence were put to the review applicant after the hearing in accordance with the requirements of section 359A and the Tribunal has considered the explanations provided. The Tribunal does not regard the explanation given to be persuasive. It is not plausible that you would not recall with some specificity details of the very limited time you had spent together. While the Tribunal accepts hearings can be stressful for the parties involved the Tribunal prefers the evidence of the review applicant as to the household arrangements in the period following their marriage. The Tribunal was concerned there was a lack of candour in the giving of the evidence by both parties in an attempt to present their relationship as being a genuine and continuing relationship.
32. The Tribunal regarded the cumulative effect of the inconsistencies in the evidence of the parties as being indicative of the relationship not being characterised by a mutual commitment to a shared life together. When this evidence was considered along with the conduct of the parties in not spending any significant periods of time with each other since their marriage the Tribunal was not satisfied both parties saw the relationship as long-term.
33. The Tribunal finds that the parties know each other personally, have socialised together on the limited occasions when the review applicant was in Afghanistan. The Tribunal is satisfied there is ongoing communication between the parties. However, the Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine spousal relationship. The Tribunal is not satisfied on the evidence that the visa applicant is committed to a shared life as husband and wife to the exclusion of all others.

CONCLUSION

34. Given the above findings, the Tribunal is not satisfied that at the time the visa application was lodged and at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is not satisfied that the parties live together or do not live separately and apart on a permanent basis. The Tribunal therefore finds that the visa applicant does not meet the definition of 'spouse' in s.5F (2) (b)-(d).
35. As the parties were married at the time of application, the applicant cannot satisfy cl.309.211 (3).
36. As the visa applicant does not meet the definition of spouse he does not meet the requirements of cl.309.211 or cl.309.221.
37. As the visa applicant does not meet the requirements of cl.309.211 and cl.309.221 the additional applicant does not meet the requirements of cl 309.321.
38. For the reasons above, the Tribunal finds the visa applicant and the additional applicant does not satisfy the criteria for the grant of the visa.

DECISION

39. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).